

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Affidavit

77-6077

To be argued by
GARY G. COOPER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6077

UNITED STATES OF AMERICA and JOHN LYONS
of the Internal Revenue Service,
Petitioners-Appellees,
—against—

THEODORE SLUK,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF ON APPEAL

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York
Attorney for the Petitioners-Appellees

GARY G. COOPER,
PATRICK H. BARTH,
Assistant United States Attorneys,
Of Counsel.

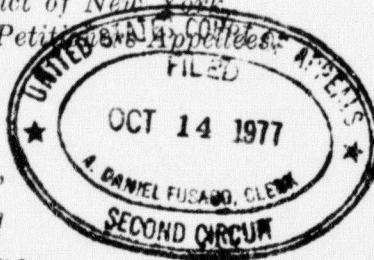




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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-6077

UNITED STATES OF AMERICA and JOHN LYONS
of the Internal Revenue Service,
Petitioners-Appellees,
—against—

THEODORE SLUK,
Respondent-Appellant.

APPELLEES' BRIEF ON APPEAL

Preliminary Statement

This is an appeal by Theodore Sluk ("respondent") from an April 18, 1977 order of the United States District Court for the Southern District of New York, Morris E. Lasker, J., directing respondent to comply with a September 9, 1976 summons issued by the Commissioner of Internal Revenue (the "Commissioner") by appearing before Revenue Agent John Lyons and producing certain documents and records.

Issue Presented for Review

- a) Whether the District Court erred in ordering respondent to comply with the summons?

Facts

Petitioners, United States of America and Revenue Agent John Lyons, brought this proceeding to enforce a September 9, 1976 summons issued by the Commissioner. The proceeding was instituted after respondent failed and refused to appear before Revenue Agent Lyons at the Internal Revenue Office, 235 Main Street, Poughkeepsie New York on September 28, 1976 at 10:00 A.M. as directed in the summons.

Revenue Agent Lyons is conducting an investigation into the respondent's income tax liabilities for the 1968 through 1972 tax years (Addendum, 9a-10a).^{*} As part of that investigation the Commissioner issued a summons dated September 9, 1976 directing respondent to appear before Lyons on September 28, 1976 and to produce certain documents and records. Respondent failed to appear on September 28, 1976 or at any other time. The testimony of respondent and the documents and records described in the summons are necessary to determine the location of respondent's assets from which income tax liabilities may be satisfied (9a).

This proceeding was commenced by serving respondent with copies of an order to show cause, dated March 17, 1977, a verified petition, dated March 15, 1977 and the affidavit of petitioner, John Lyons dated December 30, 1976 (3a-11a). The order to show cause directed respondent to appear and show cause before the District Court on April 12, 1977 why he should not be compelled to comply fully with the September 9, 1976 summons (3a-4a). Respondent failed to appear before the District Court on April 12, 1977; however, he did submit an affidavit dated April 4, 1977, in opposition to the order

^{*} For the convenience of the Court, a copy of certain documents filed in the District Court are reproduced in an Addendum to this brief. "a" refers to the pages of the Addendum.

to show cause. (A8-A9).^{*} The Government responded to the respondent's affidavit with a memorandum of law April 12, 1977. On that same day the District Court granted the Government's motion on respondent's default and so endorsed on the order to show cause, directing the Government to submit an order. The order was submitted and entered on April 18, 1977. (1a a).

The April 18, 1977 order directed respondent to comply with the summons on or before May 17, 1977 at 10:00 A.M. (A5 and A6).^{*} On or about May 16, 1977 the District Court filed an order staying the provisions of the April 18, 1977 order pending the hearing and determination of the instant appeal.

ARGUMENT

POINT I

The District Court Properly Ordered The Respondent To Comply With The Summons.

The Commissioner is authorized to issue summons directing witnesses in an investigation to appear for examination and requiring the production of relevant books, papers, records and other documents under 26 U.S.C. § 7602. Failure to comply with such summons may be redressed in the district courts under 26 U.S.C. §§ 7402(b) and 7604(a), which confer jurisdiction in such courts to enforce Internal Revenue Service summons. In the case at bar the summons was duly issued, the respondent, to whom the summons was directed, failed to appear at the designated time and place and failed to provide the records which he was directed to

^{*} "A" refers to the appendix filed by respondent along with his brief.

produce. Hence, the court below properly exercised its jurisdiction in requiring the respondent to appear and show cause why the summons should not be enforced.

The Government's burden in enforcement proceedings is to demonstrate that the investigation is being conducted for a lawful purpose; that the inquiry for which the summons has been issued may be relevant to that purpose; that the information which is sought is not already in its possession and that proper administrative prerequisites have been satisfied. *United States v. Powell*, 379 U.S. 48, 57, 58 (1964).

In the present case the Government submitted a petition and an affidavit of John Lyons which clearly satisfied each of these criteria. The Lyons affidavit and the petition establish that respondent was being directed to appear for examination and to produce records in furtherance of an investigation into his income tax liabilities for the 1968 through 1972 tax years. The documents also establish that the summons was issued by the Commissioner in a lawful manner. The records sought were ^{not} in the possession of the Commissioner. (6a, 9a-12a). Therefore, the Government plainly met its initial burden of demonstrating the need for and regularity of the summons.

Once the Government met its burden, it was incumbent upon the respondent to demonstrate that enforcement of the summons would constitute an abuse of the court's process. *United States v. Powell*, *supra*, at 58; *Donaldson v. United States*, 400 U.S. 517, 527 (1971); *see United States v. Davey*, 543 F.2d 996, 1000 (2d Cir. 1976).

Respondent elected not to appear before the court below at the time designated in the order to show cause. Instead he submitted an affidavit in which, in substance, he stated that the summons was merely an effort by the Government to harass him and his family (A8 and A9). This allegation was not supported by specific facts and was properly rejected by the District Court.

POINT II**The Government Did Not Mislead the Court Below.**

Respondent argues that the Government misled the Court below by failing to inform it of a prior proceeding instituted by the Government against respondent, which respondent mistakenly concludes was a criminal matter. Respondent argues that the instant action was instituted for the sole purpose of enforcing a judgment in the earlier case and that the Government thereby deliberately deceived the court below. This argument is totally misplaced.

This Court may, in its discretion, take judicial notice of other proceedings in other courts. See Fed. R. Civ. P. 44(a). Hence, the record of the action referred to by respondent, 74 Civ. 944 (RO), is available to this Court for its review. In summary, the action, *United States of America v. Sluk*, 74 Civ. 944 (RO) was a "responsible person case" involving respondent who was the chief officer of Taconic Concrete Structures, Inc. ("Taconic"), which failed to remit withholding taxes to the Government for the fourth quarter 1966 and the first quarter 1967. The action was commenced against respondent on March 18, 1974 by serving him with a copy of a summons and complaint. On November 19, 1975, respondent was served with an amended complaint. Respondent failed to file an answer to the complaint and a default judgment was entered against him on January 6, 1976 for the sum of \$58,976.21 together with interest therein.

The 1974 case, on its face, has no connection with the investigation that Agent Lyons is conducting. The Lyons investigation is concerned with respondent's federal income tax liability for the 1968 through 1972 tax years. The earlier action was concerned with respondent's responsibility, as an officer of Taconic, for payment of the

employee withholding taxes for the fourth quarter 1966 and first quarter of 1967.* Moreover, while a judgment is outstanding against respondent on the liability as a responsible person, it does not, contrary to respondent's assertions, involve criminal penalties.

The Government did not mislead the court below with respect to the purpose and intent of the summons. If the Government wishes to pursue the earlier liability there are various legal avenues open to it. It clearly would not serve any purpose to create a fictitious investigation and to issue an Internal Revenue summons to conduct an examination of respondent to determine the whereabouts of his assets in order to enforce an outstanding judgment of the district court. Consequently the "improper purpose" doctrine which respondent has invoked has no application to the present circumstances. See *Donaldson v. United States, supra*; *United States v. Wall Corp.*, 475 F.2d 893 (D.C. Cir. 1972).

Suffice it to say that the respondent's argument that the Government has perpetrated a subterfuge against the court below is woven of whole cloth.

* See 26 U.S.C. § 6672.

CONCLUSION

The April 18, 1977 order of the district court directing respondent to comply with the September 9, 1976 summons should in all respects be affirmed and this Court should direct respondent to comply with the summons in thirty days.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York*
Attorney for the Petitioner 8.

GARY G. COOPER,
PATRICK H. BARTH,
*Assistant United States Attorneys,
Of Counsel.*

ADDENDUM

Order

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

M-18-304

UNITED STATES OF AMERICA and JOHN LYONS
of the Internal Revenue Service,

Petitioners,

—v.—

THEODORE SLUK,

Respondent.

An order having been issued directing Theodore Sluk the respondent herein to show cause why said respondent should not fully comply with the summons issued by the Commissioner of Internal Revenue directing respondent to appear before an Internal Revenue Officer, and said order having been served upon respondent, and said order to show cause having come on to be heard before me on the 12th day of April, 1977 and Annette H. Blum, Special Assistant United States Attorney having appeared in support thereof and respondent having submitted an affidavit in opposition but having failed to appear,

Now, on motion of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, it is

ORDERED AND DECREED: that Theodore Sluk, the respondent herein, fully comply with the summons by ap-

Order

pearing at the office of the Internal Revenue Service at 235 Main Street, Poughkeepsie, New York, before Revenue Agent John Lyons or his representative on or before May 17, 1977 at 10:00 A.M. and by producing at that time the documents and records referred to in the Internal Revenue Services' summons forming the basis of the order to show cause herein.

Failure to comply with this order may subject the respondent to a charge of contempt of court and an order of contempt of court may be submitted to the presiding judge without any further notice and a writ of body attachment may be issued by the Clerk of the Court.

Dated: New York, New York
April 14, 1977

MORRIS E. LASKER
United States District Judge

Order to Show Cause

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M-18-304

UNITED STATES OF AMERICA and JOHN LYONS
of the Internal Revenue Service,
Petitioners,

—v.—

THEODORE SLUK,
Respondent.

Upon motion of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, the annexed petition and the affidavit of John Lyons, Revenue Officer, Internal Revenue Service,

IT IS HEREBY ORDERED that the above-named respondent show cause before this Court in Room 506 of the United States Courthouse, Foley Square, New York, New York, on April 12th, 1977, at 10:30 a.m., or as soon thereafter as counsel can be heard, why said respondent should not be compelled to comply fully with the Summons issued by the Internal Revenue Service, which Summons was duly issued and served on the respondent; and it is

FURTHER ORDERED that good and sufficient service of a copy of this order and the annexed petition and affidavit shall be made by personal service upon respondent, Theodore Sluk, which service shall be made either by the United States Marshal or by an authorized officer or agent of the Internal Revenue Service on or before April 5th, 1977; and it is

Order to Show Cause

FURTHER ORDERED that the respondent shall have five (5) days after service of said Petition within which a written response may be filed.

Dated: New York, New York
March 17, 1977.

CHARLES M. METZNER
U. S. D. J.
(Part One)

Order to Show Cause—Petition and Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
77 Civ.

UNITED STATES OF AMERICA and JOHN LYONS
of the Internal Revenue Service,
Petitioners,

—v.—

THEODORE SLUK,
Respondent.

ROBERT B. FISKE, JR.,
*United States Attorney,
Attorney for the United States
of America.
Tel. 791-9153*

Motion granted on default. Submit order.

MORRIS E. LASKER
U. S. D. J.

4/12/77

Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ.

UNITED STATES OF AMERICA and JOHN LYONS
of the Internal Revenue Service,

Petitioners,

—v.—

THEODORE SLUK

Respondent.

The United States of America and John Lyons, Revenue Officer, Internal Revenue Service, by their attorney, Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, for their petition, state upon information and belief:

1. This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 7402(b) and 7604(a), to enforce judicially an Internal Revenue Service Summons.

2. The petitioner, John Lyons is employed as a Revenue Officer in the office of the District Director of Internal Revenue, Albany District, with a post of duty at 235 Main Street, Poughkeepsie, New York.

3. Respondent, Theodore Sluk, resides on Rte. 292, Holmes, New York, within the jurisdiction of this Court.

Petition

4. Petitioner Lyons is conducting an investigation for the purpose of collecting the outstanding income tax liabilities of the respondent for the periods 1968, 1969, 1970, 1971 and 1972 as set forth in the Affidavit of John Lyons attached hereto as Exhibit A.

5. Pursuant to this investigation, on September 9, 1976, an Internal Revenue Service Summons, a copy of which is attached hereto as Exhibit B, was issued by Revenue Officer John Lyons under the authority of 26 U.S.C. §§ 7402 and 7604 directing the respondent to appear before him on September 28, 1976 at 235 Main Street, Poughkeepsie, New York at 10:00 a.m., to testify and to produce for examination books, records and other papers, more fully described in the attached summons.

6. A copy of this summons was served on the respondent by Revenue Officer John Lyons on September 17, 1976 as is set out in the attached Affidavit.

7. On September 28, 1976, the respondent failed to appear in response to the summons. The respondent's failure to comply with the summons continues to date as is set forth in the attached Affidavit.

8. The testimony and the books, papers, records or other data sought in the summons may be relevant to the collection of respondent's income tax liabilities for the years 1968, 1969, 1970, 1971, and 1972; the information sought is not presently in the possession of the Internal Revenue Service.

9. No previous application has been made for the order or relief sought herein.

10. It is the practice of this Court to proceed by Order to Show Cause in these matters.

Petition

WHEREFORE, the petitioners, the United States of America and John Lyons request (1) the issuance of an order directing that the respondent show cause why the respondent should not be compelled to comply fully with the Internal Revenue Service Summons duly issued and served upon respondent; (2) that the Court enter an order directing the respondent to obey the Summons fully and directing his attendance and testimony and the production of the books, records and papers as required and called for by the terms of the Summons, before a proper officer of the Internal Revenue Service, at such time and place as may hereafter be fixed by Revenue Officer John Lyons or any proper officer of the Internal Revenue Service; (3) that the United States be granted its costs in maintaining this action; and (4) that the Court render such other and further relief as is just and proper.

Dated: New York, New York
March 15, 1977.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
Attorney for Petitioners,

By: /s/ ANNETTE H. BLUM
Special Assistant United States
Attorney,
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-9153

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977

Affidavit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and JOHN LYONS
of the Internal Revenue Service,

Petitioners,

—v.—

THEODORE SLUK,

Respondent.

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss

I, JOHN LYONS, being first duly sworn, depose and say:

1. I am employed as a Revenue Officer in the office of the District Director of Internal Revenue, Albany District, with a post of duty at 235 Main Street, Poughkeepsie, New York 12601.

2. In my capacity as a Revenue Officer, I am conducting an investigation for the purpose of collecting the outstanding income tax liabilities of the respondent for the periods of 1968, 1969, 1970, 1971 and 1972.

3. As a part of the above investigation an Internal Revenue Service summons was issued directing the respondent to appear before me on September 28, 1976 to testify and produce for examination the books, records

Affidavit of John Lyons

and other papers described in the body of said summons; a copy of this summons is attached to the Petition as Exhibit B.

4. On September 17, 1976, I served the Internal Revenue Service summons described in paragraph 3 above on the respondent by leaving an attested copy of said summons with Mr. Richard Mayer at the respondent's last and usual place of abode.

5. On September 28, 1976, the respondent failed to appear in response to the summons. The respondent's failure to comply with the summons continues to the date of this affidavit.

6. It is necessary to examine the books, records and other papers demanded by the summons and to take the testimony of the respondent in order to ascertain the location of assets out of which the income tax liabilities of the respondent for the periods 1968, 1969, 1970, 1971 and 1972 may be collected.

JOHN P. LYONS
Affiant

Subscribed and sworn to before me this
20th day of December, 1976

ROBERT G. BLOCK
#5347590
Expires 3/30/78

11a

Summons

INTERNAL REVENUE SERVICE

In the matter of the tax liability of Theodore Sluk
Holmes, N.Y.

Internal Revenue District of Albany, N.Y.

Period(s) 1968 thru 1972

The Commissioner of Internal Revenue

To Theodore Sluk

At Holmes, N.Y.

Greetings:

You are hereby summoned and required to appear before John Lyons, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth.

All documents and records in your possession or control which are necessary to enable a representative of the Internal Revenue Service to complete a current financial statement for the above-named taxpayer; a blank copy of such financial statement is attached hereto to guide you in your production of the necessary documents & records.

Place and time for appearance: at Internal Revenue Office, 235 Main St., Poughkeepsie, N.Y. on the 28th day of Sept., 1976 at 10:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this
9th day of Sept., 1976.

Signature JOHN LYONS
Title Revenue Officer

ORIGINAL

Certificate of Service of Summons

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date Sept. 17th, 1976 Time 3:45 P.M.

HOW SUMMONS WAS SERVED

- ☐ I handed an attested copy of the summons to the person to whom it was directed,
- ☒ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

Mr. Richard Mayer

Signature John Lyons
Title Revenue Officer

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
14th day of October 19 77 she served ~~a~~ ^{two} copies of the
within Appellees' Brief on Appeal

by placing the same in a properly postpaid franked envelope addressed:

Theodore Sluk
P. O. Box 155
Pawling, New York 12564

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian J. Bryant

14th day of October, 19 77

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978

BEST COPY AVAILABLE

